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Choice in Government Software Procurement: A Winning Strategy

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Fueled by expanding e-government initiatives, heightened security concerns, and a keen desire to enhance the interoperability among various legacy and new systems, governments all over the world are re-examining their IT needs and their IT procurement processes. While technology procurement is an important decision for governments, as this article will show, it needs to be made on the merits and not based on express or implicit preferences, both for sound policy reasons and because to do otherwise could very well be illegal.

Governments are such significant purchasers of IT products and services that their purchasing decisions have a substantial impact on the world's IT marketplace. This fact calls into question the wisdom of decisions by a few policymakers (on national, state, and local levels) around the world that have sought to limit the ability of governmental agencies to engage in a truly independent, critical, and objective analysis when deciding about software procurement. Some such policymakers have sought to require that governmental procurement officials give varying degrees of preference to open source software ("OSS") when evaluating competing software solutions, claiming, among other things, that such preferences are justified because OSS is cheaper and more interoperable than proprietary software and needs government handicapping in order to enter the market to compete with incumbent proprietary software providers.[1]

However, governments around the world (e.g. the United Kingdom, Ireland, Canada, New Zealand, Denmark, *et al.*) as well as leading scholars and institutions, such as the Harvard Berkman

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[1] See, e.g. *Government Open Source Policies*, available at *www.practicalapplications.net/kb/0408_ospolicies.pdf* (listing various countries' approach to open source software procurement, including: *Australia*—proposed amendment requiring Public Service Agencies prefer OSS "wherever practicable" (September 2003); *Costa Rica*—proposed bill requiring state institutions prefer the use of OSS in their information systems (April 2003); *Columbia*—bill proposed mandating that all state institutions and state majority owned enterprises exclusively use OSS in their information systems (August 2002).

Center[2] and the International Chamber of Commerce,[3] have increasingly concluded that procurement preferences for specific technology solutions or software licensing/business models, whether overt or implicit, are bad public policy and do not reflect the realities of the current IT marketplace. These commentators correctly point out that such preferences can arbitrarily force product uniformity and vendor lock-in, thereby significantly impeding the benefits of choice, competition, and innovation that flow from technical solutions based on multiple interoperable sources. As a result, governments may be prevented from securing the best technical solution available, which can be particularly imprudent given the current rapid convergence of technologies in an increasingly heterogeneous IT eco-system that permits the ability to choose and combine the best proprietary and best open source products to forge an ideal solution. For example, at a major BEAWorld event in Beijing in December 2005, leading OSS advocates agreed that the greatest prospect for success with OSS involves a strategy of *mixing* OSS with proprietary software. Moreover, they concluded that proprietary software and OSS will co-exist "very long into the future, and competition between them will benefit the customer."[4] In short, software choice, competition, and combination is the better policy, *not* software uniformity or exclusiveness.

However, software procurement preferences are not simply regarded as bad public policy. The court decisions in Brazil and Belgium discussed below also demonstrate that they may also be per se illegal under well-established principles of law including equal protection and non-discrimination. Ideally, therefore, policymakers should develop procurement policies that are *neutral* with respect to specific technologies or platforms and that allow the governmental decision-maker to choose the best alternative in a particular situation based on reasonable, objective criteria. An example of such criteria is set forth in the model procurement policy attached to this article that was recently adopted by the American Legislative Exchange Council ("ALEC"). Such a neutral, flexible, and objective approach—provided that it is properly implemented and applied—is the optimal way not only to meet the specific business needs of the project and ensure interoperability among diverse IT systems, but also to maximise competition, innovation, and consumer choice.

[2] See *Roadmap for Open ICT Ecosystems*, Berkman Ctr. for Internet & Soc'y, Harvard Law School (2005), p.25, available at *http://cyber.law.harvard.edu/epolicy* ("Technology and brand neutrality in procurement specifications (. . .) reduces the possibility of vendor or technology lock-in by emphasizing choices and procurement decisions based upon what works best. It will also reduce costs, increase competition and help smaller vendors to compete. Use metrics that focus on performance characteristics, business needs and contributions that help open the ICT ecosystem."). See also J.V. DeLong, *The Enigma of Open Source Software (Version 1.0)* (Progress & Freedom Foundation, March 2004), p.47, available at *www.pff.org/issues-pubs/pops/pop11.8opensource.pdf* ("For governments to embrace open source as *the* model would be a serious error. The only rational policy for governments is to let the models compete on a level playing field. If open source is superior it needs no preference; if it is not; it deserves none."); D.S. Evans and B.J. Reddy, "Government Preferences for Promoting Open-Source Software: A Solution in Search of a Problem" (2003) 9 Mich. Telecomm. Tech. L. Rev. 313 at 387, available at *www.mttlr.org/volnine/evans.pdf* ("One would need to evaluate open-source software and proprietary software on a case-by-case, product-by-product basis. (. . .) The market will veer toward open-source software solutions if they are superior, so there is no reason why the government needs to push the market in that direction. As we have noted earlier, governments have bad track records at picking technology winners and losers.").

[3] See also *Open Source Software, Policy Statement*, Int'l Chamber of Commerce (October 2005), p.5, available at *www.iccwbo.org/uploadedFiles/ICC/policy/e-business/Statements/373-466_open_source_software.pdf* ("ICC opposes government procurement preferences and mandates that favor one form of software development or licensing over others. Governments, like all potential and existing customers, should choose software on a technology neutral and vendor-neutral basis, examining the merits of the technology based upon the performance factors stated above. As a general rule, governments should not discriminate against or ban the procurement of software based on its licensing or development model. Such preferential policies prevent public authorities from effectively weighing all relevant factors in their procurement decisions.")

[4] See D.K. Taft, "Experts Recommend Mixing Open-Source and Commercial" (December 9, 2005), available at *www.eweek.com/article2/0,1895,1899712,00.asp*.

1. Court decisions rejecting open source preference laws

Governments attempting to impose software procurement preferences for OSS are now experiencing a significant backlash from IT solutions providers that are being arbitrarily excluded from competitive procurement processes. And some of these complaints and lawsuits have led to court decisions invalidating these OSS preference laws. Below are two such examples of high level court decisions invalidating governmental attempts to establish preferences in software procurement.

Brazil: In April, 2004, the Brazilian Supreme Court voted unanimously to bar enforcement of a law passed by the Rio Grande do Sul state legislature, which required the use of OSS in governmental agencies when available. Specifically, the law stated:

> "The Direct and Indirect Public Administration, Independent Agencies and Foundations in the State of Rio Grande do Sul, as well as any autonomous bodies and companies under the State control, *shall preferably use software free of any proprietary restrictions (open source software) regarding grant, changes and distribution on their computing systems and devices.*"[5] (author's translation)

The law defined Open Source Software as follows:

> "Software with industrial or intellectual property licenses that do not restrict, under any circumstances, the granting, distribution, use, modifications to its original features, ensuring the user non-restrictive access, with no additional charges, to its source code, and allowing partial or total modification to the software for improvements and adequacy."[6] (author's translation)

Following a constitutional challenge to the law by Brazil's Party of the Liberal Front, the Brazilian Supreme Court granted a temporary injunction on three primary grounds. The first ground (and the one that is the focus of this article) is the Court's holding that Brazilian law requires that, in the interest of open and meaningful competition, all bidders for public contracts be given *equal opportunities.*[7] As set forth in Title III of Brazil's 1988 Federal Constitution,

> "public works, services, purchases and disposals shall be contracted by public bidding proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations, maintaining the effective conditions of the bid, as the law provides, which shall only allow the requirements of technical and economic qualifications indispensable to guarantee the fulfilling of the obligations". (Author's translation)[8]

[5] Text of Rio Grande Do Sul Legislation, Law 11.871 (December 19, 2002), Art.1, available at *www.proposicion.org.ar/doc/referencias/www.al.rs.gov.br/lei_11871-02.html* (emphasis added). The original version (in Portuguese) reads as follows: "*A administração pública direta, indireta, autárquica e fundacional do Estado do Rio Grande do Sul, assim como os órgãos autônomos e empresas sob o controle do Estado utilizarão preferencialmente em seus sistemas e equipamentos de informática programas abertos, livres de restrições proprietárias quanto a sua cessão, alteração e distribuição*

[6] *ibid.*, at Art.1(1). The original reads as follows: "*Entende-se por programa aberto aquele cuja licença de propriedade industrial ou intelectual não restrinja sob nenhum aspecto a sua cessão, distribuição, utilização ou alteração de suas características originais, assegurando ao usuário acesso irrestrito e sem custos adicionais ao seu código fonte, permitindo a alteração parcial ou total do programa para seu aperfeiçoamento ou adequação.*"

[7] Beyond the violation under principles of equal protection, the Court also found that: (1) the state legislation flouts federal procurement prerogatives, as it is exclusively the federal government that has the ability to establish such general policy norms for government contracting; and (2) the legislation runs afoul of the requirement that there be a separation of powers between the state's legislative and executive branches. This article does not focus on these two alternative findings.

[8] Federative Republic of Brazil, Constitution of 1998 with Reforms Through 2005, Title III, Ch.VII, s.I, Art.37 (XXI), available at *www.georgetown.edu/pdba/Constitutions/Brazil/britle3.html.* The original version (in Portuguese) reads as follows:

Thus, the Court concluded, the law interferes with constitutionally mandated principles of equal treatment and non-discrimination. With respect to preferences in public procurement, the Court explained:

> "[I]n order to prove a comparative superiority, it must be demonstrated, during the bidding process, where the technical requirements, technological acquirement and financial costs would be best met by the acquisition, maintenance and adaptation of the product. That is, an analysis should be issued, based on objective criteria and data included in the call for bid rules logically placed within the scope of the Public Administration. Then, the competitor with the best results, according to the provisions in the call for bid, shall be deemed as winner of the process. In short, if open software is, in fact, in the greatest interest to the Public Administration, this must be shown in terms of the highest scores regarding objective criteria in the call for tender rules."[9] (Author's translation)

The Court also made clear that determination as to the superiority of one product over another must be made on a case-by-case basis and that before the fact preferences would not be tolerated:

> "The objective scope of the state law being questioned was a declared and before-the-fact preference for a certain type of electronic product: open source software or software entirely exempt of proprietary restrictions. Therefore, the state law itself removes the isonomic nature of the bidding process to replace the Public Administration by issuing a before-the-fact analysis of the superiority of a certain computer-related product before other competitors. These competitors are known to be in large number and equally characterized by an increasing technological sophistication of their products. In other words, the law itself was in charge of creating a preference and thus anticipating a concrete or empiric administrative evaluation; an evaluation translated as a presumption that a certain software better meets the Administration's interests than others. Additionally that it best satisfies these interests at all times, and it should be added, as if the computer products market was not characterized by a huge and unlimited margin for constant improvement."[10] (Author's translation)

This decision does not reflect a preference for proprietary software, nor does it mean that Brazil's state and federal governmental agencies cannot, or will not, elect to implement open source IT solutions in situations where this is the best option. Rather, it emphasises the importance of neutral and non-discriminatory practices in all areas of public procurement, including IT and software, in which all potential bidders are afforded their constitutionally guaranteed equal protection of the law and in which the virtues of each software alternative:

> "may only be confirmed within the process that encompasses the bidding process itself (. . .) on a case-by-case basis, every day, moment by moment, in each bidding, according to the nature

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"[r]essalvados os casos especificados na legislação, as obras, serviços, compras e alienações serão contratados mediante processo de licitação pública que assegure igualdade de condições a todos os concorrentes, com cláusulas que estabeleçam obrigações de pagamento, mantidas as condições efetivas da proposta, nos termos da lei, o qual somente permitirá as exigências de qualificação técnica e econômica indispensáveis à garantia do cumprimento das obrigações."

[9] Brazilian Supreme Court Decision (vote by Minister Carlos Ayres Britto), paras 23–24, available at: *www.stf.gov.br/jurisprudencia/IT/frame.asp?PROCESSO=3059&CLASSE=ADI%2DMC&cod_classe=555&ORIGEM=IT&RECURSO=0&TIP_JULGAMENTO=M&EMENTA=2160%20.*

[10] *ibid.*, at para.20.

> of the Public Administration's needs and objectives on one side, and on the other, the ever changing quality of the products in question". (Author's translation)[11]

This decision should raise the level of concern of any government that has or is considering the adoption of laws or policies that prefer one type of software over another.[12]

Belgium (and the Law of the European Community): In February, 2003, the Budget Commission of the Assembly of the French speaking community of Brussels ("Cocof") adopted a proposal that would force the Cocof administration to exclusively use OSS. The President of the Cocof Assembly requested the legal opinion of the Belgian Supreme Administrative Court on the proposed decree. The Court characterised the intent of the proposed decree as follows:

> "The examined proposal of decree primarily intends to impose on the administration of the French-speaking community commission, the exclusive use of free software, of open data formats and of open communication protocols in order to fulfill its tasks, i.e., the acquisition, the treatment, the archiving, the exchange or communication of computerized data, with the exception of certain specific tasks for which there is no operational solution on the basis of such software."[13]

The Belgian Supreme Administrative Court opinion made clear that such procurement decisions must be made on a case-by-case basis:

> "The technical prescriptions—which have to enable the characterization of the object of a market, in order for the product, the supply or the requested service to correspond exactly to the contracting authority's intention—have to be necessarily determined on a case by case basis, according to each market, by the contracting authority itself (. . .) and not by legislative act or an implementing decree."[14]

Such a requirement is necessary to ensure that public contracts are awarded based on a careful assessment of the specific needs (which can change significantly over time) of the government at the time of procurement. This concern is especially relevant when procuring for IT products and services due to the highly dynamic and increasingly heterogeneous IT marketplace.

Furthermore, the Court ruled that any legislative proposal concerning public procurement, whether for software or otherwise, must respect the fundamental principles of equality and non-discrimination because Belgian federal law required compliance with EC law, which, in turn, is based on these core

[11] *ibid.*, at para.21.

[12] See also Press Release, Initiative for Software Choice, *ISC Hails Brazilian Supreme Court Decision; Calls Biased Software Acquisition Law Unconstitutional*, April 30, 2004, available at *www.softwarechoice.org/download_files/Brazil_SupremeCourt_Ruling.pdf* ("The 10-0 ruling shows that the Court sides with open competition driven by merit, not by intentional bias designed to limit options", stated Gilberto Galan, Latin American representative for the ISC. "Thankfully for public and private stakeholders, the ruling will promote greater choice by allowing all parties to sit at the table instead of a chosen few. (. . .) These types of laws are devastating to the local ICT industry", noted Galan. "Our research shows that more than 80 per cent of the Brazilian ICT industry sells or develops commercial solutions. When you wall this group off from access to government markets, you had better have a compelling reason for it. Yet, none exists. The market works, the local ICT industry thrives, local innovation flourishes, and consumers are receiving what they need and want. The Court must have seen this, realizing that the Rio Grande do Sul's preference law is inimical to free competition, which has brought about tremendous public and private-sector benefits.")

[13] Royal Kingdom of Belgium: Advice 35.227/2 of the Legislative Section of the State Council ("Belgian State Council Decision").

[14] Belgian State Council Decision, pp.2–3.

principles.[15] The principles of equality and non-discrimination are derived from the EU Treaty and have been repeated in the EC Directives, including Directive 2004/18 of the European Parliament and the Council ("EU Public Procurement Directive"),[16] which governs most major public sector procurement. This Directive consolidates and amends the rules applicable to public procurement in the EU and unequivocally requires neutrality in the public procurement process. Specifically, Art.2 of the EU Public Procurement Directive provides as follows: "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way." Likewise, Art.23(2) states,

> "Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition."

These requirements aim to promote competition and prevent contracting authorities from distorting competition and eliminating certain parties from the market or bidding process.[17]

Also consistent with these goals, the European Court of Justice ("ECJ") has opposed contracting bidding processes that would prevent certain entities from participating in the tender process. For example, in *Commission v Ireland*,[18] the ECJ considered a requirement in a public procurement contract for constructing a water main that called for the use of pipes that conformed to a specific Irish standard. In opposing the requirement, the ECJ ruled that the provision had the effect of limiting the companies that could tender as only those companies which were complying with that standard could propose an offer, and that municipality's concerns could be met by an *equivalent* product that also satisfied the purchaser's performance requirements. In another leading case, *Commission v Netherlands*,[19] the ECJ held that reference to technical specifications which mention goods of a specific make or source or of a particular process (in the case, the UNIX data processing system) and which have the effect of favouring or eliminating, whether directly or indirectly, certain undertakings or products is contrary to public procurement law.[20]

Based on its strict adherence to the foregoing principles of equality and non-discrimination required by both the Belgian Constitution and governing EC law, the Initiative for Software Choice hailed the Belgian Supreme Administrative Court opinion as a landmark decision that will facilitate competition and greater consumer choice:

[15] *ibid.* (describing how Belgian law requires compliance with European Directives, such as Council Directive 92/50, available at *www.tendersdirect.co.uk/thelaw/PPF/ecd9250.asp#title63*, and Directive 93/36, available at *www.tendersdirect.co.uk/thelaw/PPF/ecd9336.asp*).

[16] See *www.minefi.gouv.fr/daj/marches_publics/ppn/ppn-anglais/07_2004-18e.pdf*.

[17] See S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn., Sweet & Maxwell, 2005), pp.128-130.

[18] See Case C-45/87, *Commission v Ireland* [1988] E.C.R. 4929; [1988] O.J. C271/5.

[19] See Case C-359/93, *Commission v Netherlands* [1995] E.C.R. I-157.

[20] From these cases, the theory of equivalence developed. Contracting authorities may refer to a specific standard or make, provided, however, that companies whose products or services do not comply with that particular standard but are equivalent to the standard (or otherwise meet the procuring entity's functional requirements) are also able to participate in the procurement bidding process. See S. Arrowsmith, cited above, fn.17, at pp.1107 *et seq.* Neither is this equivalence requirement limited by Council Decision 87/95 on standardisation in the field of IT and telecommunications, [1987] O.J. L36/31 (the "IT Standards Decision"), which imposes an obligation on public contracting authorities to use European or international standards when procuring for IT products and services. See S. Arrowsmith, cited above, fn.17, p.1154 (explaining that "[i]f a procuring entity uses recognized standard specifications without indicating that it will accept equivalents (. . .) there will be a violation of the EC Treaty obligation to draft specifications in such a way as to indicate that the entity will accept all products that meet its functional requirements, as well as a violation of the directives' obligations on specifications.").

> "[A]ny legislative proposal concerning public procurement must respect the fundamental principles of the Belgian Constitution, in particular the principles of Equality and Non-Discrimination. The ISC believes that proposals like Cocof's fail to reflect the reality of the competitive and globally interdependent ICT eco-system. Governments, their constituents and the ICT industry never gain when options are eliminated and viable choices are otherwise reduced through nothing more than arbitrary law or regulation. This opinion of the Supreme Court should serve as a reference for all legislators, in Belgium and beyond, considering laws imposing the exclusive use of OSS on public authorities. As governments seek to better serve their constituents through ICT, merit-base choice—not restrictive mandates—will help make those services the best that they can be."[21]

It is evident from the Brazilian, Belgian, and ECJ decisions discussed above that governments that have established (or are considering) software preferences may be—perhaps without even fully realising it—exposing their constituent agencies and officials to avoidable legal risks and other significant costs. Although these decisions may not technically be controlling law outside of the respective courts' jurisdictions, given that they are each predicated on principles of equal protection and non-discrimination which permeate jurisdictions across the globe, they will likely be looked upon as examples for courts in other countries that are facing, or may soon face, similar challenges to software procurement preferences. At a minimum, law makers and policy makers should closely examine the applicable legal requirements in their respective jurisdictions regarding these animating principles before considering the adoption of software procurement preferences.

2. US Federal Government information technology and software procurement policy

In an effort to avoid legal challenges similar to those faced by law makers in Brazil and Belgium, the US federal government has removed all doubt regarding the use of preferences in IT procurement decisions. In a July, 2004 memorandum, the Office of Management and Budget ("OMB") reminded agencies of the policies and procedures covering acquisition of software to support agency operations. Specifically, the OMB instructed that:

> "The Office of Management and Budget (OMB) Circulars A-11 and A-130 and the Federal Acquisition Regulation (FAR), guide agency IT investment decisions. These policies are intentionally technology and vendor neutral, and to the maximum extent practicable, agency implementation should be similarly neutral. As this guidance states, all agency IT investment decisions, including software, must be made consistent with the agency's enterprise architecture and the Federal Enterprise Architecture. Additionally, agencies must consider the total cost of ownership including lifecycle maintenance costs, the costs associated with risk issues, including security and privacy of data, and the costs of ensuring security of the IT system itself."[22]

[21] See Press Release, Initiative for Choice, "Belgian Supreme Administrative Court Says Proposed Open Source Preference Law No Good", June 5, 2003, available at *www.softwarechoice.org/download_files/Cocof.release.final.pdf*.

[22] Memorandum from K.S. Evans, Administrator, IT and E-Gov, US Office of Management and Budget, to Senior Procurement Executives and Chief Information Officers regarding Software Acquisition (July 1, 2004), available at *www.whitehouse.gov/omb/memoranda/fy04/m04-16.html*.

Specifically, with respect to software procurement, the OMB memo went on to clarify that:

> "This reminder applies to acquisitions of all software, whether it is proprietary or Open Source Software. Open Source Software's source code is widely available so it may be used, copied, modified, and redistributed. It is licensed with certain common restrictions, which generally differ from proprietary software. Frequently, the licenses require users who distribute Open Source Software, whether in its original form or as modified, to make the source code widely available. Subsequent licenses usually include the terms of the original license, thereby requiring wide availability. These differences in licensing may affect the use, the security, and the total cost of ownership of the software and must be considered when an agency is planning a software acquisition."[23]

This policy reflects the US Government's commitment to neutrality and choice and its desire to consider all relevant factors when making IT purchasing decisions.

3. Case studies: Massachusetts, California, and Peru retreat from efforts to impose software procurement preferences

A prime example of the significant uncertainty, waste, and delay that can arise when policy makers attempt to impose software procurement preferences can be seen in Massachusetts, where, for more than a year, a battle waged on about the legality of a proposal to remove much of the discretion from governmental IT purchasing decisions.

In September, 2003, the Secretary of Massachusetts's Department of Finance and Administration stated in a memorandum that "[e]ffective immediately, we will adopt (. . .) a comprehensive Open Standards, Open Source policy for all future IT investment and operating expenditures."[24] The policy shift was immediately seized upon by state law makers who questioned whether such an approach was even legal under Massachusetts's code. In a formal letter, state Senator Marc Pacheco, Chairperson of the Post Audit and Oversight Committee, demanded to know: (1) "[u]nder what legal authority is the Administration purporting to act in implementing its Open Source/Open Standards Policy"; and (2) "how the policy, which appears to be a preferential policy, does not run afoul of the Massachusetts General Laws (. . .)".[25] In a committee hearing that followed, Senator Pacheco explained that "[w]e have a procurement statute that's on the books that allows and directs open competition".[26] He further explained that, since the new policy would so heavily favor OSS, it would not only exclude local software companies from competing for a significant portion of the state's $230 million annual IT budget,[27] it would arbitrarily force state agencies, etc. to use OSS even if traditional software would be a better fit.[28]

Chapter 30B, s.14 of The Massachusetts Uniform Procurement Act states that:

[23] *ibid.*

[24] W.D. Gardner, "Mass. Open Source Vs. Proprietary Software Battle Heats Up" *TechWeb.com* (January 7, 2004), available at *www.techweb.com/wire/26803715.*

[25] *ibid.*

[26] H. Bray, "Open Source Battle is Heating Up" *Boston Globe* (December 22, 2003), available at *www.boston.com/business/technology/articles/2003/12/22/open_source_battle_is_heating_up?mode=PF.*

[27] M. Semilof, "Massachusetts Budget Czar Bullish on Open-source" *SearchWin2000.com* (September 30, 2003), available at *http://searchwin2000.techtarget.com/originalContent/0,289142,sid1_gci930055,00.html.*

[28] H. Bray, cited above, fn.26.

> "Unless no other manner of description suffices, and the procurement officer so determines in writing, setting forth the basis for the determination, all specifications shall be written in a manner which describes the requirements to be met without having the effect of exclusively requiring a proprietary supply or service, or a procurement from a sole source."[29]

Based, in part, on these statutory requirements, Massachusetts was required to scrap the OSS preference plan and, instead, adopted a policy requiring all IT solutions to be:

> "selected based on best value after careful consideration of all possible alternatives including proprietary, public sector code sharing and open source solutions."[30]

This "best value evaluation" requires agencies to:

> "consider, at a minimum, total cost of ownership over the entire period the IT solution is required, fit with identified business requirements, reliability, performance, scalability, security, maintenance requirements, legal risks, ease of customization, and ease of migration."[31]

It should be noted that it is not sufficient for Massachusetts or any other state or national government to simply *adopt* a policy based on choice and neutral objective criteria; it must also faithfully and vigilantly *implement* and *apply* this policy in each situation and not use it simply to shield discriminatory or outcome determinative procurement decisions. In this regard, it is appropriate to mention that certain parties, including the Association for Competitive Technology ("ACT"), Microsoft, and others, have challenged a recent decision by Massachusetts to require all executive agencies to purchase only software implementing native support for a new open standard—called "OpenDocument"—as of January 1, 2007. These parties claim, among other things, that this decision violated established Massachusetts procurement laws requiring selection of the best value product based on a neutral, objective assessment.[32] If the allegations of ACT and others prove to be right, then the discriminatory *impact* of the Massachusetts policy (notwithstanding its *facial* neutrality) would deprive consumers and industry from accruing the various benefits in increased competition, innovation, and choice discussed in this article.

[29] See General Laws of Massachusetts, Pt I, Title III, Ch.30B, s.14 (Uniform Procurement Act) ("MA Uniform Procurement Act"), available at *www.mass.gov/legis/laws/mgl/30b-14.htm*.

[30] Commonwealth of Massachusetts, Executive Office for Administration and Finance Information Technology Division: *Enterprise Information Technology Acquisition Policy* (Policy #: ITD-APP-02) (effective date: January 13, 2004), available at *www.mass.gov/Aitd/docs/policies_standards/itacquisitionpolicy.pdf*.

[31] *ibid.*

[32] See, e.g. ACT Comments (September 8, 2005), pp.2–3, available at *www.actonline.org/documents/050910ETR Mcomments2.pdf* ("Limiting the acceptable office document formats to one necessarily limits software procurement options to the very few products that support the format and thus undermines rather than enhances competition. The policy effectively prejudges the offerings of vendors whose products could meet the procuring agency's needs just as well as those using the designated standard and denies those using alternative formats the opportunity to even present their case to the agency. Indeed, there is really only one product that will truly support the OpenDocument format—OpenOffice 2.0—and it is not even available yet. Other software systems identified by the policy as supporting the format—Sun's StarOffice, KOffice and IBM Workplace—are, like OpenOffice, all based on the same code that Sun purchased from a German company in 1999. Each has its own set of enhancements and limitations, but each will need to be revised to accommodate changes required by the forthcoming OpenOffice 2.0. To achieve Best Value, a procurement must balance and support the principles of 'achievement of required outcomes, *best quality economic values*, timely performance, *minimizing the burden on administration resources*, expediting simple or routine purchases, *flexibility in developing alternative procurement and business relationships, encouraging competition*, encouraging the continued participation of quality contractors and supporting State and Department procurement planning and implementation.' 801 CMR 21.02. ITD's adoption of the OpenDocument format runs counter to several of these principles.") (Emphases added)

Massachusetts is not alone in its decision to revise its procurement policy to eliminate preferences. Other US states, and indeed governments around the world, are questioning existing policies and responding to the concerns of both law makers and major segments of the IT marketplace. For example, in California, the California Performance Review Recommendation SO10, *Explore Open Source Alternatives,* was interpreted by some as recommending or establishing a preference for open source solutions. In response, California's Chief Information Officer issued a statement clarifying the state's policy of software neutrality. He explained that:

> "CPR Recommendation SO10, if interpreted as establishing a preference for open source solutions, does *not* reflect state policy. There is no policy giving a preference in project design or in procurement for open source or proprietary solutions. The architecture of individual information technology projects is determined initially by the project owner, and the analysis supporting those decisions typically appears in a Feasibility Study Report (FSR). Our standards require consideration of reasonable alternatives in an FSR so that we can ensure the State receives a solution that is well aligned with our business needs. The goal of an information technology procurement is simply to get "best value" for the State. Although there are certain statutory preferences that may affect procurements, there is no preference for open source solutions or for any other software architectures."[33]

Likewise, on October 17, 2005, Peruvian President Alejandro Toledo approved Law 28612, 2005, mandating neutral technology procurement in the central government.[34] This marked a dramatic reversal by Peru to reject its prior attempts to enact a procurement policy that would have established an express preference for open source software over proprietary software. The adopted policy instead requires consideration of all relevant software in procurement. Before acquiring software, governmental agencies must produce a public report comparing the value of alternatives and identifying the software that best meets their needs. The law requires that procuring entities apply the principles of technology neutrality, transparency, efficiency, and austerity when making acquisitions.

Finally, it's worth noting that on January 16, 2006, the Mayor of Rio de Janeiro, Brazil vetoed the OSS preference bill (Bill 324/2005) that had been passed by the City Council in December 2005. The Mayor took this appropriate action on the grounds that the OSS preference law was unconstitutional and inconvenient for the Public Administration, particularly in light of the Brazilian Supreme Court decision discussed above which had enjoined a similar OSS preference law.[35]

Procurement laws like those in Massachusetts, California, and Peru are designed to protect the integrity of the governmental procurement process and ensure equality and non-discrimination for all bidders. Additionally, the requirement of equal protection of the laws (upon which both the Brazilian and Belgian courts relied and upon which the above-referenced EU Directives are based) is

[33] State Chief Information Officer J.C. Kelso: Statement Regarding CPR Recommendation SO10 *(Explore Open Source Alternatives)* (February 16, 2005), available at *www.cio.ca.gov/PDFs/022105_CIOOpenSourceStatement.pdf* (emphasis in original).

[34] See M. Kanellos,"Peru's President approves Open-Source Bill" *CNETnews.com* (October 21, 2005), available at *http://news.com.com/Perus+president+approves+open-source+bill/2110-7344_3-5907226.html.*

[35] See Official Letter GP/CM No.404 (January 13, 2006), available at *www.aspasiacamargo.com.br/noticias/noticias_interna.php?codTexto=313* (Portuguese version); see also *www.comptia.org/sections/publicpolicy/docs/eUpdate_01%2006.pdf*. (On December 13, 2005, the Spanish Parliament also rejected, by a vast majority, two draft laws that would have introduced a categorical preference for OSS in the Spanish public administration.)

a bedrock component of most state constitutions.[36] Thus, the fundamental principles of fairness, equal treatment, and non-discrimination in all extensions of governmental authority, including purchasing, will continue to guide courts and law makers faced with preference laws. States or countries that have implemented or are considering policies or legislation imposing direct or indirect preferences for particular types of software can expect to encounter similar legal challenges based on their own requirements for equality and non-discrimination in governmental procurement procedures.

4. A better approach: model language endorsing choice and neutral, objective criteria

For governments and agencies looking to update and clarify their software procurement policies, it may be helpful to review the American Legislative Exchange Council's[37] ("ALEC") model legislation regarding neutrality and integrity in software procurement. ALEC's model legislation is primarily designed to preserve choice, competition, and integrity in the selection and installation of software products. Generally, it requires that software procurement decisions made by the contracting authority consider: (1) the total cost of ownership during the full life of the software, including service and maintenance; and (2) performance criteria and value of the software based on its ability to meet the specific needs of the state, such as reliability, ease of learning, ease of use, security, privacy, and interoperability. The model law also prevents the contracting authority from limiting software choice through express or implied preferences for any specific model of software licensing. Appendix A of this article sets out the full text of the model legislation.

5. Conclusion

Governmental preferences for particular types of software (such as open source software or proprietary software) are increasingly and widely considered bad public policy in that they arbitrarily force product uniformity and vendor lock-in, thereby significantly impeding the benefits of choice, competition, and innovation that flow from technical solutions based on multiple interoperable sources. This approach is particularly improvident in light of the rapid convergence of technologies in the current heterogeneous IT eco-system that permits the ability to choose and combine the best proprietary and best open source products to forge an ideal solution.

[36] See, e.g. *California*— Art.1, s.7(a) (in part): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation"; Art.1, s.8: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin"; *Texas*– Art.1, s.3: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

[37] Founded in 1973, ALEC is the nation's largest bipartisan individual membership association of state legislators, with more than 2,400 members nationwide. In addition, with more than 300 corporate and private foundation members, ALEC is one of America's most dynamic public-private partnerships. ALEC provides its public and private sector members with a unique opportunity to work together to develop policies and programmes that effectively promote the organisation's mission. See *www.alec.org/*.

But such preferences may not simply be bad public policy; they may also be per se illegal. As the court decisions in Brazil and Belgium discussed above demonstrate, such preferences in software procurement policies contravene well-established principles of equal protection and non-discrimination set out in federal or state law, constitutional provisions, and governing EC law. Because such principles are at the centre of societies and governments worldwide, these decisions should serve as a cautionary tale to *any* government that is considering the imposition of such procurement preferences.

The better public policy approach, and the one that is most consistent with these animating principles and with the constitutions and laws of jurisdictions across the globe, is for policy makers to develop procurement policies that are both *neutral* with respect to specific technologies or software platforms and based on reasonable, objective criteria, such as the following: (1) the overall cost of procuring the software and the administration over the projected life of the product; (2) interoperability/reliance on open standards and other industry technology standards; (3) reliability; (4) vendor support; (5) ease of use; (6) security; and (7) availability of warranties and indemnities for intellectual property claims.[38]

For the convenience of governments interested in pursuing this approach, this article attaches in Appendix A model legislation regarding neutrality and integrity in software procurement that was adopted and is endorsed by the American Legislative Exchange Council.[39] Whether governments use this particular model legislation or their own customised version of it, such a neutral, open, and objective approach—which is increasingly being embraced by governments around the world,[40] as well as by scholars and learned commentators such as the Harvard Berkman Center[41] and by the

[38] Likewise, efforts by governments to mandate a particular path to interoperability to the exclusion of others—such as the requirement to use *only* a specified open standard—may wind up curtailing the flexibility of government agencies or organisational divisions to use alternative means that would have resulted in even *greater* levels of interoperability had they been pursued. For example, if a government mandates reliance on a particular open standard that is immature and unproven, and that ultimately turns out to be costly and ineffective, it may have foregone significant interoperability advances that could have been obtained had the government instead been more flexible in allowing alternative broadly accessible proprietary standards, certain industry collaborations, and/or other means to chart its interoperability course. Accordingly, to avoid these pitfalls, and to maximise the level of interoperability, governments should embrace a policy that allows for "choice" by their software procurement and other divisions seeking interoperability solutions—*choice* as to which one of various options is the best means of achieving interoperability in a given situation; *choice* regarding which open standard(s) and/or proprietary standard(s) to rely on under the circumstances; and *choice* between open source software and proprietary software in the procurement process. This flexible approach predicated on choice is particularly appropriate in the rapidly converging IT world, in which customers and governments increasingly rely on a *combination* of proprietary and open source software, as well as open standards and proprietary standards, to develop an ideal interoperability strategy.

[39] ALEC graciously granted the author permission to reprint this model legislation in its entirety as an attachment to this article.

[40] See, e.g. *Canada:* IT procurement policy (April 2004) seeks to ensure that "policies and guidelines do not bias one software business model over another". To this end, the Canadian Government will "review and monitor federal procurement practices to ensure a level playing field," available at *www.tbs-sct.gc.ca/fap-paf/oss-ll/oss-ll/page01_e.asp*. Specifically, Canada's OSS position requires agencies and departments to base all software decisions on both their business needs and several key factors, including: (1) reduction in integration complexity; (2) security/privacy; (3) proven standards/technologies; and (4) total cost of ownership, available at *www.tbs-sct.gc.ca/fap-paf/oss-ll/position_e.asp*; *United Kingdom:* Updated policy (October 2004) concludes that "UK Governments will consider [open source] solutions alongside proprietary ones in IT procurements. Contracts will be awarded on a value for money basis", available at *http://archive.cabinetoffice.gov.uk/e-envoy/frameworks-oss-policy/$file/oss-policy.htm*; *Denmark:* Policy (June 2003) directs institutions to "procure the software solution that has the maximum value for money measured on the basis of merit and local business need irrespectively of whether this implies using proprietary software solutions or open source"), available at *www.videnskabsministeriet.dk/cgi-bin/theme-list.cgi?theme_id=71406&_lang=UK*; *New Zealand:* Policy on software procurement (2003) states, "'Value for money' and 'fitness for purpose' principles should continue to underlie any software procurement decisions made by government agencies", as well as issues of functionality, interoperability, and security, available at *www.e.govt.nz/policy/open-source/open-source-200303.pdf*.

[41] See above, fn.2.

International Chamber of Commerce[42]—is the optimal way (provided that it is faithfully implemented and applied) not only to meet the specific business needs of the project and ensure interoperability among diverse systems, but also to maximize competition, innovation, and consumer choice.

Appendix A

Neutrality and Integrity in Software Procurement Act

Adopted by ALEC's Telecommunications & Information Technology Task Force at the Annual Meeting July 30, 2004. Approved by full ALEC Board of Directors August, 2004.

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Summary

This Act amends the state's procurement rules to preserve choice, competition, and integrity in the state's selection and installation of software products. It requires that software procurement decisions made by the state consider: (1) the total cost of ownership during the full life of the software, including service and maintenance; and (2) performance criteria and value of the software based on its ability to meet the specific needs of the state. The Act also prevents the state from limiting software choice through express or implied preferences for any specific model of software licensing. Finally, the Act prevents state employees from circumventing procurement rules and information security requirements when acquiring or installing software.

Model Legislation

Section 1. Title

This Act may be cited as the "Neutrality and Integrity in Software Procurement" Act.

Section 2. Legislative Findings

The legislature finds that:

A. There is a broad variety of software products designed to serve Public Agencies;
B. Public Agencies are capable of evaluating software choices in terms of performance, value, cost, and licensing terms conveying varying rights and restrictions.

The legislature proposes:

A. to require that software procurement decisions made by Public Agencies take into account the Total Cost of Ownership; and
B. to require that software procurement decisions made by Public Agencies take into account the overall value and performance of the software, with respect to the specific needs of the Public Agency and general criteria such as reliability, ease of learning, ease of use, security, privacy, and interoperability; and
C. to prevent Public Agencies from limiting software choice through express or implied preferences for specific models of software licensing; and
D. to prevent Public Agencies or public employees from circumventing procurement rules when acquiring or installing software.

[42] See above, fn.3.

Section 3. Definitions

"Public Agencies" means a state government agency, department, commission, council, board, bureau, committee, institution, college, university, technical school, government corporation, or other establishment of the executive, legislative or judicial branches. Public Agencies also include interstate or regional entities participating in multi-state or multi-jurisdictional procurements. Public Agencies also include local political subdivisions such as counties, municipalities, school districts, or public service districts.

"Procurement" means buying, purchasing, renting, leasing, licensing, or otherwise acquiring any goods or services. It also includes all functions that pertain to the obtaining of any goods or services, including description of requirements, selection and solicitation of sources, preparation and award of contracts, installation, maintenance, and all phases of contract administration.

"Computer Software" means a set of Computer Programs, procedures and associated documentation concerned with computer data or with the operation of a computer, Computer Program, or Computer Network.

"Computer Program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, causes the computer to perform one or more computer operations.

"Software Source Code" means pre-compiled, human-readable versions of a Computer Program.

"Computer Network" means a set of related, remotely connected devices and any communications facilities, including multiple computers with the capability to exchange data via communications facilities.

"Total Cost of Ownership" means the sum of all costs borne by the Public Agency during the useful life of the software, including costs for software acquisition, installation, worker training, conversion or loading of existing data, interface and integration with related information systems, and long-term costs for software maintenance, upgrades, and technical support.

Section 4. Main Provisions

A. Decisions by Public Agencies regarding the requisition, procurement, and installation of Computer Software shall be based upon performance and value criteria, including quality, functionality, security, reliability, interoperability, and Total Cost of Ownership.

B. Decisions by Public Agencies regarding the requisition, procurement, and installation of Computer Software must be neutral with respect to:
   1. whether such Computer Software is provided by a for-profit entity or a non-profit entity; and
   2. the licensing model under which such Computer Software is provided.

C. However, nothing in this Act shall preclude Public Agencies from considering the effect of specific licensing terms in software procurement decisions, including licensing terms that govern the availability of Software Source Code, rights and restrictions regarding software modification, redistribution, warranties, and intellectual property indemnification.

D. Public Agencies and public employees must conform with the state's software procurement and acquisition rules regardless of the licensing model under which software is provided.

Section 5. Effective Date

This Act will become effective immediately upon signature by the Governor.